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Abstract

Prior to drafting State legislation pertaining to collective negotiation in education, it is necessary to understand the essential differences between public and private employment and to determine whether teachers should be included under a statute covering many categories of public employees or whether they should receive separate statutory treatment. Following this determination of the general legislative approach, several decisions must be made concerning the following content areas of the statute: (1) Rights and obligations of employers and employees; (2) structure of the negotiating unit; (3) type of recognition; (4) ascertaining employee choice; (5) scope of negotiation; (6) negotiation impasse; and (7) strikes and penalties. (JH)

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NEGOTIATION IN PUBLIC EDUCATION: DEVELOPING A LEGISLATIVE FRAMEWORK

EA 002 632

Report No. 13
Education Commission of the States
Denver, Colorado
May, 1969

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negotiation in public education: developing a legislative framework

by
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Mr. Chanin is also the author, along with Donald H. Wollett, of **Collective Negotiations in Public Education: A Manual of Practice and Procedure** which will be published in the early fall by the Bureau of National Affairs.

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Subsequent to the preparation of this document for publication the State of Vermont enacted a negotiation statute for certificated employees of school districts (No. 127 of the Acts of 1969). Of particular significance is Section 2010 (INJUNCTIONS), which provides as follows.

> No restraining order or temporary or permanent injunction shall be granted in any case brought with respect to any action taken by a representative organization or an official thereof or by a school board or representative thereof in connection with or relating to pending or future negotiations, except on the basis of findings of fact made by a court of competent jurisdiction after due hearing prior to the issuance of the restraining order or injunction that the commencement or continuance of the action poses a clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent. Any restraining order or injunction issued by a court as herein provided shall prohibit only a specific act or acts expressly determined in the findings of fact to pose a clear and present danger.

Although there is some precedent for this type of provision in a prior Vermont statute applicable to certain non-professional public employees (No. 198 of the Acts of 1967, Sec. 32), it represents the first express limitation on the use of the injunctive process in connection with a teacher strike contained in any legislation. See discussion in Part III Section G of this document.

introduction

The impetus for the present accelerated state legislative activity in the area of public education negotiation may be traced to Executive Order No. 10988 issued by President Kennedy on January 17, 1962, which established a new framework for employee-management relations in the federal service. Although it did not directly affect any teachers[1] other than the 6,000 to 7,000 employed by the United States Department of Defense on military bases and the Department of Interior on Indian reservations, it signified a change in attitude toward negotiation in the public sector. The middle 1960's saw a spate of negotiation statutes enacted throughout the country and, at the time of this writing, a significant number of states have had proposals for such laws introduced into their legislatures.[2] The basic structure of the statutes that have been enacted or proposed differs markedly, reflecting organizational philosophies, interorganizational rivalries, employer pressures and political realities.

It is the purpose of this document to indicate some of the problems involved in drafting negotiation legislation for public school teachers and to discuss some of the alternative methods available for dealing with them. Although it is our intention to cast the presentation in objective terms, positions are taken in

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[1] Unless otherwise indicated by express statement or context, the term "teacher" is used in this document to refer to all professional employees of a public school system.

[2] While there has been some question as to the constitutional authority of the federal government to regulate the relationship between state and local governmental employees and their governmental employer, the decision of the United States Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968), suggests an affirmative answer. Accordingly, federal regulation of teacher-school boards relations in the future must now be viewed as a realistic possibility. See, *e.g.*, the federal negotiations statute for public school teachers which was developed by the National Education Association of the United States and introduced by Senator Metcalf. S. 1951, 91st Cong., 1st. Sess. (1969).

regard to the following two threshold issues in order to keep the discussion within a manageable context:

A. We do not propose to debate the question of whether it is desirable for a state to enact some type of statute regulating the employment relationship between teachers and boards of education. For present purposes, it is assumed that a decision has been made to do so.

B. In addition, it is assumed that this statute will require a school board to deal with the teachers' organizational representative as distinguished from "permissive" legislation which merely authorizes a school board to engage in negotiation if it chooses to do so. We consider the latter to be a process of voluntary agreement similar to the non-statutory methods which have been used in the past on an *ad hoc* school district by school district basis.

Since the existing statutes vary widely in their terminology,[3] it is important, at the outset, to define rather precisely what we mean by "negotiation." Traditionally, most school boards have been willing to listen to the presentations and proposals of teacher organizations and some have even been willing to go further and to meet systematically with such organizations and discuss possible changes in salaries, fringe benefits and personnel policies. As used in this document, the term negotiation means something quite different. It contemplates the same kind of give-and-take, exchange of proposals and counter-proposals and action by mutual agreement that characterize the marketplace. As a practical matter, it means the substitution of bilateralism for unilateralism in the making of many school managerial decisions. In short, we see negotiation as representing a substantial departure from the usual way of doing business in public education.

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[3] Thus, teachers and school boards in Massachusetts and Michigan are authorized to engage in "collective bargaining"; in New York and New Jersey, they may participate in "collective negotiation"; and in California, Minnesota and Oregon, teachers are given the right to "meet and confer" with school boards. This concern with labels is also reflected in the legislative positions taken by the various teacher organizations. Whereas the American Federation of Teachers and its affiliated organizations traditionally seek statutorily to obtain the right to engage in "collective bargaining," the National Education Association and its affiliates prefer the designation "professional negotiation." Although certain legal implications may flow from the use of a phrase with a well-defined meaning as opposed to one that is newly-coined, we view these distinctions largely as reflecting differences in form rather than substance. Accordingly, in this document we shall refer to the various statutes without distinction as "negotiation statutes."

general framework

In attempting to develop a system of negotiation in public education, it must be recognized that there are basic economic and political differences between public and private employment. Among these differences are the following:

A. Employers in the private sector act largely on the basis of a profit motive whereas public employers function as the custodians of public funds. Accordingly, their motivation is essentially political rather than economic.

B. Fundamental to the collective bargaining process in the private sector is the virtually unlimited right of employees to strike and of management to lock-out.

C. In private collective bargaining, management has the power to make commitments and to carry them out. Many public agencies, on the other hand, do not have final authority to determine the size of their budget. To be most effective, therefore, negotiation must precede the adoption of the budget, and the ability of the public agency to fulfill commitments made as to salaries and other economic items often will be dependent upon the subsequent appropriation of sufficient funds.

D. Many conditions of public employment are dealt with by legislation. Thus, the protection provided for certain public employees in regard to retirement, tenure, sick leave and other matters often is influenced by political as well as economic factors.

The foregoing is not meant to imply that experience gained in the private sector is of no value here. The point is, rather, that analogies have limited application and the forms and procedures developed for private employment do not necessarily provide a monolithic model for public employment. The special Committee on Public Employee Relations established by New York's Governor Nelson Rockefeller in 1966 to recommend appropriate legislation for that state made the point as follows:

> Despite many complexities, we believe it is both feasible and desirable to develop a system of effective collective negotiation in the public service. This can be achieved in a manner which is consonant with the orderly functioning of a democratic government. It cannot be achieved by transferring collective bargaining as practiced

> in the private sector into the governmental sector. New procedures have to be created. (emphasis supplied)[4]

Any attempt simply to bring public employees under the coverage of legislation designed to regulate bargaining in the private sector would prevent the flexibility necessary to develop such new procedures. It is generally accepted, therefore, that public employees should be covered by a separate statute which takes cognizance of and is structured to deal with the many unique aspects of public employment.

While there is relatively little dispute regarding this point, considerable controversy surrounds the question of whether teachers should be included under a statute covering many categories of public employees or whether they should receive separate statutory treatment.[5] Those who take the latter view rest their case upon the proposition that teachers, by reason of their training and traditions, have an interest not necessarily shared by other public employees in the quality of the service provided by the enterprise of which they are a part. It is contended that this distinction, which allegedly has significance for a variety of legislative purposes,[6] is obscured when teachers and other public employees are treated as equivalents legislatively. Although several states have enacted separate teacher negotiation laws,[7] others apparently have concluded that the similarities among the various categories outweigh the dissimilarities and that a single statute creating the right to negotiate for many types of public employees, including teachers, is operationally more efficient.[8]

It should be noted that there are intervening alternatives which accommodate to some extent the concerns of both groups. Thus, specific features relating to a particular category of public employees may be included within an all-inclusive statute. The recently enacted New Jersey statute, which covers many categories of public employees, illustrates the point. While granting public employees the virtually unlimited right to join any employee

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[4] Governor's Committee on Public Employee Relations, Final Report, March 31, 1966, p. 19.

[5] It should be emphasized that the question is not whether there should be a separate statute covering *all* employees of boards of education. Those who advocate a separate statute would limit its coverage to the professional or certificated employees of a school system.

[6] *E.g.*, the definition of the subject matter in respect to which the parties are required to negotiate; the particular grouping of jobs which constitute an appropriate negotiating unit; the potential impact of a work-stoppage; etc.

[7] *E.g.*, California, Connecticut, Maryland, Minnesota, Nebraska, North Dakota, Oregon, Rhode Island and Washington. For purposes of convenience, state statutes will be referred to in this document only by state name and, where appropriate, specific section. Official citations for the various statutes are set forth in Appendix A.

[8] *E.g.*, Massachusetts, Michigan, New Jersey, New York, South Dakota and Wisconsin.

organization, the statute apparently recognizes policemen as occupying a somewhat unique position and prohibits them from joining "an employee organization that admits employees other than policemen to membership" (Section 7).

The various "teacher only" laws and the more inclusive statutes frequently share one common feature in regard to coverage—both exclude the principal executive officers of the employing agency. Thus, the all-inclusive New Jersey statute grants certain rights to public employees with the exception of "managerial executives" (Section 7) and the Maryland "teacher only" law applies to "any certificated professional person employed by a public school employer . . . except the Superintendent of Schools" (Section 1(a)(3)).

One final point perhaps worth mentioning in this connection is the distinction between statutory coverage and negotiating unit structure. Coverage refers to the categories of employees over which the statute takes jurisdiction and generally is reflected in the definition of the word "employee." Negotiating unit has reference to the appropriate grouping of job categories among covered employees for purposes of dealing with the representatives of management.[9]

A second basic question of approach concerns the method by which the statute is to be administered and enforced. Again, the existing laws show considerable diversity. California, Maryland, Minnesota and certain other states have enacted statutes setting forth mutual rights and obligations but have left their administration and enforcement to the traditional judicial processes. The reasons for taking this approach are presumably of a pragmatic nature: It is less expensive and does not require a special budgetary appropriation, and it avoids political opposition on the ground that the statute would contribute to an already overly-complex bureaucracy.

Many feel however, that legislation of this type does not readily lend itself to self-implementation. Although it is conceded that in some instances teacher organizations and school boards have managed to agree upon the structure of the appropriate negotiating unit, to establish procedures for the management of an election and to define the scope of negotiation without undue conflict, it is maintained that if these and other difficult questions are to be resolved in a fair and rational way, there should be some specific agency responsible for their disposition. Moreover, experience has demonstrated that the mere passage of legislation does

[9] See Part III, Section B (p. 11).

not necessarily mean the acceptance of the concept of negotiation, and attempts by teachers to implement such statutes have been met sometimes with resistance and repressive tactics. While court enforcement is an available avenue of redress, it is an expensive and time-consuming process with the result that teachers, on occasion, have been left dissatisfied or disillusioned or have been forced to resort to various forms of self-help in order to obtain their statutory rights.[10]

If a specific agency is to be assigned the responsibility to administer and enforce the statute, the question then arises whether a special board or commission should be established or whether this responsibility should be vested in some existing agency. The principal arguments in favor of the creation of a separate body are that this tends to enhance the prestige of the members and enables them to develop the expertise that is necessary in order to handle properly many of the problems that are peculiar to public employee relations. New York and Illinois are two of the relatively few states which established task forces to study in depth the problems involved in negotiation by public employees. It is noteworthy that both groups, after intensive study, concluded that the administration and enforcement of a negotiation statute should be vested in a specially created agency. Although the Illinois Legislature thus far has failed to enact any type of negotiation statute, the 1967 New York statute adopts this recommendation of Governor Rockefeller's Committee and establishes a separate Public Employment Relations Board.

If the administration and enforcement are to be entrusted to some existing agency, the determination of which one would depend to a large extent upon the position taken in regard to coverage. Thus, if the statute applied only to teachers, the administration and enforcement might properly be vested in the state department of education or the commissioner of education. If, on the other hand, the statute covered a broader spectrum of employees, these functions could be assigned to the same agency that handles collective bargaining in the private sector (*e.g.*, the department of labor or the state mediation board).

An alternative to creating a separate statute and a separate agency in recognition of the distinction between teachers and other categories of public employees would be to establish a Public Employment Relations Board with separate divisions such

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[10] The position taken on the question of administration and enforcement appears to bear a relationship to the position taken in regard to coverage. Thus, all of the more-inclusive statutes utilize an administering agency, whereas the teacher-only laws vary in their approach.

as (1) police and fire; (2) health and welfare; (3) transit; (4) public utilities; and (5) education. This agency could then be authorized to promulgate rules to accommodate the realities and needs of each category.

content of the statute

To this point, consideration has been given to the basic statutory approach which might be taken in developing a system of negotiation in public education. Turning now to specifics, which aspects of the employer-employee relationship should the statute attempt to deal with and what are some of the ways in which it might deal with them? For purposes of discussion, the various matters that we believe warrant legislative attention have been divided into the following categories:

A. Rights and obligations of employers and employees.
B. Structure of the negotiating unit.
C. Type of recognition.
D. Ascertaining employee choice.
E. Scope of negotiation.
F. Negotiation impasse.
G. Strikes and penalties.

Before considering these matters in detail, several preliminary comments are appropriate. The above breakdown is somewhat artificial, and there is obviously an overlap between the categories. For example, the type of recognition provided for will significantly affect the methods for determining the organizational representative, and the nature of the impasse machinery will bear importantly upon the approach taken in regard to the strike question. Notwithstanding these and other similar points of overlap, however, a division of the foregoing type materially aids the clarity of the presentation.

Nor is it possible within the confines of this document to consider each of these matters in great detail or to fully explore all of the subsidiary points which are relevant to them. The discussion will be of necessity somewhat general and will focus upon what we

consider to be the fundamental elements of each of the indicated subjects.

Finally, the handling of many of these matters would depend to a large extent upon the decisions made regarding the structural questions considered in the preceding section of this document. Thus, the scope of bargaining, the criteria for determining an appropriate negotiating unit and the like might differ if the statute covered all public employees as opposed to just teachers. In order to provide some direction for the discussion, the focus is upon teacher-school board relations. With appropriate modifications, however, the comments made would be applicable in most cases to other categories of public employees as well.

A. Rights and Obligations of Employers and Employees

The statutes that have been enacted almost invariably guarantee to teachers the basic rights to organize, to select a negotiation representative of their own choosing, and to participate in related concerted organizational activities. These rights are generally protected against interference by "restraint, coercion or reprisal" by teacher organizations as well as by school boards. It is not uncommon to prohibit certain specific unlawful acts by a school board or a teacher organization, including most frequently a failure on the part of either party to negotiate in good faith with the other or to incorporate any agreements reached in a written document if requested to do so.

There is considerably more diversity in the procedures available for protecting these rights and preventing unlawful acts. In the absence of an administering agency, court enforcement provides the method of redress. The statutes that utilize an administering agency generally give that agency the authority to enforce the provisions of the statute, but they differ in the degree of specificity with which the enforcement procedures are set forth. The Massachusetts statute, for example, provides in some detail the procedures for filing and processing a complaint that there has been a violation of the statute (Section 178L). The New Jersey statute, on the other hand, simply authorizes the administering agency to "establish rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration, including enforcement of statutory provisions concerning representative elections and related matters" (Section 6(b)). Whereas the New Jersey approach transfers from the legislature to the agency more

voice in developing and implementing state policy, it also provides increased optional flexibility since administrative rules can be modified when necessary more easily than can a statutorily prescribed procedure.

A second aspect of this general topic concerns the rights guaranteed to individual teachers vis-a-vis the teacher organization. Thus, many statutes guarantee to individual teachers not only the right to join employee organizations and participate in their activities, but also guarantee the negative right to refrain from doing so. This latter guarantee is basically a "right to work" provision which has implications for the types of union security provisions that a school board and the organizational representative validly may agree to.[11]

A related question is the extent to which an individual teacher may bypass the organizational representative and deal directly with his employer in regard to negotiable matters. Several legislatures have felt it important to guarantee expressly the right of the individual to make his position on various matters known and/or to present grievances to the school board. In order not to undermine the exclusive status of the recognized organization, however, the exercise of this right may be subjected to certain qualifications—to wit, that the organizational representative will have the opportunity to be present at such meetings and state its views, that the individual may not be represented by an officer or agent of a rival teacher organization, and that no adjustment that is made will be inconsistent with the terms of any agreement between the school board and the organizational representative.

B. Structure of the Negotiating Unit

We are confronted here initially with a basic question of statutory purpose: Should the statute determine whether a particular grouping of jobs constitutes an appropriate unit for negotiating with the school board or should it simply set forth the criteria to be applied in making that determination? The nature and implications of this distinction are discussed below.

Although there are other somewhat less troublesome issues,[12] the primary problem in public education in regard to structuring an appropriate negotiating unit is whether supervisors—that is, personnel who have the power to hire, fire,

[11] *E.g.*, the legality of an "agency shop" provision, under which non-members of an organization recognized as the exclusive representative, while not required to become members of that organization, are required to pay to it a specified service charge designed to cover their share of the cost of negotiation and contract administration.

transfer, suspend, promote, discipline and the like or to effectively recommend such action–should be included in a unit consisting of teachers whom they supervise. Analytically, two categories of supervisors may be distinguished–they are (1) the superintendent of schools and his immediate assistants, and (2) first-line supervisors, such as principals, vice-principals, department heads, etc.

The statutory posture of the first category may be disposed of summarily. On the ground that the superintendent and his assistants, as the chief executive officers of the school system, invariably function as the representatives of management in the day-to-day operation of the schools and particularly in the administration of any collective agreement, they almost always are excluded not only from a classroom teacher negotiating unit but, as previously indicated, from the coverage of the statute itself. The treatment of first-line supervisors presents a considerably more vexing problem, however, reflecting both organizational rivalries and school board pressures, as well as the influence of private sector concepts.

The position of the American Federation of Teachers and an increasing number of school boards is that first-line supervision should be excluded statutorily from a teacher unit. This position ostensibly is based upon the theory of class consciousness–that is, that supervisors are, by hypothesis, in conflict with the rank-and-file employees whom they supervise. This philosophy is reflected most graphically in the Rhode Island statute which provides that "principals and assistant principals are excluded from the provisions of this Act" (Par. 28-9.3-2). A less extreme but similar approach is that taken in the Michigan statute which guarantees principals and other such supervisors the right to participate in negotiation but requires that they do so through a separate supervisory unit.[13]

The position of many of the affiliates of the National Education Association, on the other hand, is that first-line supervision always should be included with non-supervisory employees in a single negotiating unit. This position, which is adopted by the statutes in Minnesota (Section 2, Subd. 2; Section 4, Subds. 2 and 3) and Washington (Sections 2 and 3),

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[12] *E.g.*, should guidance counsellors, librarians, psychologists, social workers and other so-called "peripheral" or "satellite" personnel be included in a classroom teacher unit?; to what extent should fragmentation of a teacher unit be permitted (*e.g.*, secondary schools v. elementary schools)?; etc.

[13] On this point, see *Hillsdale Principals and Supervisors Association and the Michigan Education Association* v. *Hillsdale Board of Education and the Michigan Association of School Boards* (Decision of Michigan Labor Mediation Board, December 2, 1968).

among others, is predicated upon the assumption that supervisors and rank-and-file teachers are invariably bound together by the so-called "unity of the profession."

In point of fact, both all-inclusive negotiating units and units excluding supervisors have functioned to the satisfaction of management, first-line supervision and rank-and-file teachers in different school systems, and several legislatures have taken the position recently that what counts is factual reality, not theory or assumption. Accordingly, they have enacted statutes that do not take a categorical approach but merely set certain guidelines to be followed in regard to local unit determinations. Under the New York statute, for example, the keystone element in the determination of the appropriate negotiating unit is community of interest among the employees affected by the negotiation (Section 207, para. 1(a)). While all groups of employees have some conflicts, the question is whether there is sufficient commonality so that these conflicts can be resolved internally or whether they are so divisive that the group cannot function as a single cohesive unit vis-a-vis the representatives of management.

The methods available for resolving disputes regarding unit determination depend essentially upon whether or not there is an administering agency. If there is, such disputes generally are referred to the agency which makes a judgment upon the basis of the particular factual situation. Where an administering agency does not exist, questions of this type may be referred to some impartial individual or agency designated on an *ad hoc* basis (*e.g.*, the American Arbitration Association), or, as is done under the Maryland statute, may be resolved by the school board (Section 175, par. (d)).

C. Type of Recognition

The overriding question in this connection is whether the majority organization should have the exclusive right to negotiate on behalf of all employees in the appropriate unit or whether there should be an alternative scheme of representation. The most frequently mentioned alternative is proportional representation, under which the statute would provide for the establishment of a negotiating committee or council with representatives drawn from each organization in proportion to the number of members that it has in the negotiating unit. This committee then would be authorized to deal with the school board on behalf of all of the teachers in the unit. A

third possibility is recognition of multiple organizations on a members-only basis.[14]

After considering the relative merits of the various possible systems of recognition, Governor Rockefeller's Committee found a number of advantages in recognizing a majority organization as exclusive representative for all employees in the unit:

> There are advantages in the elimination of the possibility that the executives of an agency will play one group of employees or one employee organization off against another. There are advantages in the elimination, for a period, of interorganizational rivalries. There are advantages in discouraging the "splitting off" of functional groups in the employee organization in order to "go it on their own." There are advantages in simplifying and systematizing the administration of employee and personnel relations. There are advantages in an organization's ability to serve all the employees in the unit.[15]

On the other hand, certain operational complexities would seem inherent in a system of proportional representation. When several organizations are represented on the same negotiating committee, each would tend to operate continuously in a competitive milieu where it must strive to outdo other organizations in order to hold present members and gain new ones. Since the minority organization has nothing to lose and everything to gain, it is apt to be excessively militant and irresponsible in taking positions on salaries or personnel policies which it believes will have maximum membership appeal. The majority organization, instead of being able to take positions which will best serve the school district and all of the members of the professional staff, may well be constrained to respond to this competition by being equally militant and just as irresponsible. Moreover, to the extent that the negotation is productive, there is likely to be maneuvering by each organization in an effort to claim credit for those things which are accomplished. Even in the absence of such strategic divisiveness, if there are legitimate substantive differences in the objectives or philosophies of the various

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[14] An additional approach is that taken in the Oregon statute which does not provide for any type of organizational recognition, but allows for the election of a committee of individuals "for the purpose of representing other such personnel by the vote of a majority of the certificated school personnel below the rank of superintendent in a school district." (Section 2).

[15] Governor's Committee on Public Employee Relations, Final Report, March 31, 1966, p. 29.

organizations, these differences presumably will be reflected in the positions taken by their representatives during negotiation and could well prevent the development of a "teacher position" on critical issues.

We do not mean to suggest that the foregoing difficulties are inevitable, and it is entirely possible that a system of proportional representation could operate effectively under certain conditions (*e.g.*, one organization is overwhelmingly predominant; interorganizational rivalry is not intense; minority organizations "boycott" the committee). However, in attempting to decide upon an appropriate statutory position, the basis for the rejection of a particular alternative need not be the inevitability of its failure but rather its potentiality for mischief.

Multiple organization bargaining would likewise appear to be inherently difficult. In order to be productive, several organizations rather than only one must agree with the school board's position. Obviously, it is more orderly to work toward and reach one agreement than it is to work toward and reach many agreements. Indeed, a members-only structure is somewhat inconsistent with the very concept of negotiation. It is not really possible to "negotiate" working conditions for the members of one organization which differ from working conditions "negotiated" for similarly situated employees in the same unit who are members of rival organizations.

Finally, under either of the latter two systems, the school board has available to it the opportunity to exploit the differences between the organizations so that they spend their time quarreling among themselves instead of moving forward and accomplishing positive gains for their constituents.

Although the exclusivity principle is sometimes resisted on the ground that it is undemocratic in a public enterprise, its supporters point out that in the political arena, the senator, congressman or other official selected by the majority represents all members of the particular voting district. While minority groups retain certain rights (*e.g.*, to protest, criticize and campaign for replacement of the majority), there is only one representative for each district. Similarly, they argue, there should be only one representative for each negotiating unit.

The clearly prevailing national trend is toward a system of exclusive recognition. Statutes providing for proportional representation are in effect only in California and Minnesota, and although some negotiation on a members-only basis has taken

place in the non-statutory context, no legislature to date has adopted this approach.[16]

As the debate regarding type of recognition has been drawing to a close, a focal point of controversy has become the respective rights and obligations of the majority and minority organizations in an exclusivity context. Most legislatures have chosen not to deal with this matter statutorily but to leave the issue to *ad hoc* judicial and quasi-judicial resolution. An exception to this legislative reluctance appears in the New York statute which sets forth certain organizational rights that must be granted to the recognized organization, including the right to membership dues deduction (Section 208(b)). Several of the more recent proposals would guarantee not only dues deduction to the majority organization, but certain access and communication rights as well and, with limited exceptions, make it not only permissible for the school board to deny these rights to the minority but make it unlawful for it not to.[17] Experience in the private sector is cited as demonstrating that this type of insulation is essential if the majority organization is to function effectively as the exclusive representative.

With exclusive status, an organization obtains not only rights but certain obligations as well—principally, the obligation to represent all members of the unit equally without regard to organizational membership. Although this would appear to be inherent in the concept of exclusivity itself, it is not uncommon for a statute to state it as an express obligation.

D. Ascertaining Employee Choice

Under a system of exclusive recognition, the organization that has the support of the majority of the teachers in the negotiating unit is designated as the representative. There is a difference of opinion, however, regarding the procedures by which this majority support should be demonstrated. More specifically, the dispute concerns the extent to which an election should be required. On the one hand, there are those

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16 The New York statute permits exclusive recognition or members-only recognition on a local option basis, but in point of fact, the recognition granted has invariably been exclusive. (Section 205, par. 5(g)).

17 Several state labor board holdings indicate that under existing exclusive recognition statutes it is not improper for a school board to grant dues deduction, access and communication rights to the majority organization while denying them to the minority. See, *e.g., Avondale School District Board of Education and Avondale Federation of Teachers, Michigan Federation of Teachers and Avondale Education Association* (Michigan Labor Mediation Board, Case No. C66 K-131, decided April 23, 1968).

who contend that it is only through an election that the teachers are afforded a free and open choice of representative and that elections should, therefore, be the only basis for obtaining recognition. It is argued in opposition that elections are disruptive and costly and, as in the private sector, should be held only when there is a legitimate doubt as to teacher preference. Thus, if an organization claims to represent a majority and can support that claim by credible evidence, it should be designated as the teachers' representative without the necessity of an election. Most statutes adopt the latter approach,[18] and evidence of majority support properly may take the form of membership lists, petitions or cards pursuant to which individual members of the negotiating unit authorize the organization to function as their representative. In order to avoid the possible designation of an organization which lacks the necessary commitment and/or financial resources (obtainable primarily through membership dues and assessments) to sustain a negotiation program and to function properly otherwise as the teachers' representative, it has been suggested that, in addition to whatever other evidence it might submit, a claiming organization should be required to have some minimum percentage of the unit as its members—possibly 30 percent.

Assuming a decision not to rely entirely on elections, it must then be decided under what circumstances an election should be held. Although this often is left largely to the discretion of the administering agency,[19] some general statutory trends are observable. Broadly speaking, when a teacher organization seeks recognition, an election may be requested either by the school board or by a rival teacher organization. The usual criteria for dealing with each of these requests are discussed below.

Unless the school board has a "good faith" doubt as to the authenticity or sufficiency of the evidence presented, it generally must grant the requested recognition. If, on the other hand, the board has such a doubt, it is justified in refusing to grant recognition. The matter is then referred to the administering agency which makes an independent evaluation as to the adequacy of the evidence submitted and either accords recognition to the claiming organization or directs that the organiza-

18 The election-only route is taken in the Washington (Section 3) and Rhode Island (Pars. 28-9.3-7) statutes.

19 The existence of an administering agency is basic to this approach, and for the discussion of this aspect of the problem it is assumed that there is such an agency.

tion put the question of its support before the members of the negotiating unit in a secret ballot election.

If a teacher organization presents adequate evidence of majority support, an election ordinarily is not necessary unless there is a rival organization which makes a competing claim of majority support. While school boards, on occasion, have sought an election in order to allow teachers to choose between the claiming organization and "no representative," uncontested evidence of majority support has generally been deemed sufficient in the absence of organizational competition. Furthermore, not every competing claim will result in an election. The claim often will be disregarded unless it is supported by sufficient evidence to raise a bona fide question as to which organization is preferred by a majority of the teachers in the unit. Under the rules of the National Labor Relations Board, an election will not be held in the private sector unless the organization seeking the election submits evidence (again in the form of membership lists, petitions or authorization cards) that at least 30 percent of the employees in the unit support it. It has been suggested that, for the reasons previously stated,[20] the statute require not merely evidence of support but actual membership in the teacher organization. Under the Maryland statute, for example, an organization cannot appear on a ballot unless at least 10 percent of the teachers in the unit are its members (Section 175, par. (e)(3)).

It generally is recognized that the teacher organization which wins an election or achieves status as the negotiating representative on the basis of other evidence should have a reasonable opportunity thereafter to prove to its constituency that it can function effectively at the negotiating table. Accordingly, the statutes in Connecticut, Massachusetts, Michigan, North Dakota and Rhode Island, among others, provide for an insulation period of one year after recognition during which the status of the representative is not subject to challenge.[21] Furthermore, where the school board and the teachers' representative enter into a collective agreement, that agreement often operates as a bar to a challenge to the status of the teacher representative for its life unless the agreement runs for an unreasonable period of time. The rule followed by the National Labor Relations Board and also contained in the

20 See text following footnote 18, *supra.*

21 To be precise, most of these statutes prohibit an election more often than once a year. Their structure is such, however, that the effect is to provide one year of unchallenged representation status.

Michigan statute (Section 423.214) is that such agreements will insulate the teachers' representative from challenge for up to three years.

A related question is whether there should be any preconditions imposed upon a teacher organization before it could achieve recognition. The suggestion occasionally is made that an organization be required to file various types of affidavits, such as a disavowal of communist affiliation and/or the right to strike. The New York statute, for example, prohibits strikes and requires from any organization seeking recognition an affidavit affirming that it does not assert the right to strike (Section 207, par. 3).[22]

E. Scope of Negotiation

In the private sector, the mandatory area of collective bargaining is defined as "rates of pay, wages, hours of employment, or other conditions of employment" (National Labor Relations Act, Sec. 9(a)). Many teacher organizations maintain, however, that such a definition is unduly restrictive when applied to teacher-school board negotiation. Basically, they contend that a teacher having committed himself to a career of socially valuable service and having invested years in preparation (and perhaps years of postgraduate study after original hire) has a special identification with the standards of his "practice" and the quality of the service provided to his "clientele." As a result of this identification, teachers characteristically seek to participate in decision-making in respect to teaching methods, curriculum content, educational facilities and other matters designed to change the nature or improve the quality of the educational service being given to the children, and they see negotiation as the vehicle for such participation. Accordingly, the statutes proposed by teacher organizations typically contain a broad and somewhat open-ended definition of scope—for example, that a school board be obligated to negotiate in regard to "the terms and conditions of professional service and other matters of mutual concern." Proposals of this type invariably are resisted by school boards who believe that teacher demands in respect to the nature of the product produced or the quality of the service provided should be non-negotiable on the ground that they exceed the

[22] Although no existing statute regulates election procedures, fiscal management and other aspects of the internal operation of public employee organizations the way that the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act does private sector unions, several of the more recent proposals do move somewhat in this direction.

scope of legitimate employee concern and intrude into the area of management prerogatives.

This point has been handled in various ways. Many school boards view with favor the approach taken in the Minnesota and Oregon statutes which limit the obligation to negotiate to salaries and other economic aspects of employment (Minnesota, Section 1, Subdivision 5; Oregon, Section 2). Attempts have been made to justify this economic emphasis on several grounds. These grounds, and the rebuttal offered, are as follows:

1. The suggestion that teachers are concerned more about economic than non-economic matters has been denied vehemently, and cases cited in which teachers allegedly have rejected attractive economic offers in favor of non-economic improvements.

2. The alternative premise that teachers are best equipped to make a contribution to decision-making on economic matters is viewed as totally invalid. On the contrary, it is argued that, by background and training, school board members probably are better able to make informed judgments on economic matters than they are in regard to matters of educational policy, whereas it is in this latter area that teachers with their special knowledge and competence as educators can make their most valuable contribution.

3. The legalistic argument that school boards are charged as public representatives with the responsibility for determining educational policies and, therefore, may not engage in negotiation regarding these matters is rejected as patently defective. Since school boards also are charged with the financial management of the school system, it would seem no less a delegation of responsibility to negotiate about economic matters.

At the other end of the spectrum are statutes of the type enacted in Washington and California which adopt an extremely broad definition of the scope of negotiability. The Washington statute, for example, provides for negotiation in regard to "policies relating to but not limited to curriculum, textbook selection, in-service training, student teacher programs, personnel hiring and assignment practices, leaves of absence, salaries and salary schedules, and non-instructional duties" (Section 3).

Most legislatures have taken a more middle-of-the-road approach and have described the scope of negotiation in such traditional collective bargaining terms as "wages, hours and

other conditions of employment." This avoids, to some extent, the accusations of legislative partisanship that are aroused by either of the two more extreme approaches, but it has not provided a trouble-free solution. Serious disputes have developed under this type of definition over the negotiability of teacher proposals regarding educational programs and services. Whereas school boards have resisted many of these demands on the ground of non-negotiability, teacher organizations generally have contended that they do, in fact, come within the meaning of the phrase "conditions of employment." While there has been some suggestion that the inevitable confrontation might be avoided if there were a specific statutory enumeration of the negotiable subjects, this could introduce an undesirable and possibly unworkable inflexibility. Experience in the private sector indicates that it may well be impossible to develop a precise statutory definition, and that the metes and bounds of negotiability can come only through the very process of *ad hoc* dispute and decision that is now being experienced.[23]

F. Negotiation Impasse

For purposes of negotiation, an impasse may be defined as a disagreement between the parties so serious that further discussions between them appear fruitless. In order to resolve such disputes, most statutes provide for a two-step procedure of third-party intervention.

The first step is generally some form of mediation. A mediator is an unbiased outsider who is sent in to assist the parties in reaching a peaceful settlement of their dispute. It is not his function to make an agreement for the parties, but by bringing to the negotiating table a fresh clinical view of the areas of disagreement, he can often be an effective catalyst in moving a negotiation towards settlement, particularly where the parties are inexperienced.

If mediation fails to produce a settlement, the dispute generally moves to fact-finding or advisory arbitration.[24] Whereas mediation is an informal, largely catalytical process, this is a more structured procedure, contemplating the presen-

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[23] In the private sector, the determination of what constitutes a condition of employment has been based, at least in part, upon the degree to which the subject has become a *de facto* subject of bargaining on a voluntary basis.

[24] Both of these phrases are in a sense misnomers. As to the first, the finding of facts is of far less significance than the recommendations made for settlement. The phrase "advisory arbitration" is somewhat internally inconsistent, since arbitration traditionally is understood as referring to a process that terminates in a binding decision. For purposes of this document, the process is referred to as "fact-finding."

tation of oral testimony, the submission of documentary evidence and many of the other attributes of a judicial proceeding.

While the foregoing may be characterized as a generally accepted framework for the resolution of negotiation impasse,[25] there are innumerable subsidiary aspects to the problem which have been dealt with in several ways.

The threshold question is the manner in which the impasse machinery may be activated. One approach is illustrated by the New York statute which provides that if no agreement has been reached by a specified number of days prior to the budget submission date, an impasse automatically will be deemed to exist (Section 209, par. 1). This is designed to avoid the continuation of negotiation beyond the point when the statutory impasse machinery can be utilized meaningfully. The need for a statutory mechanism for this purpose is somewhat questionable, however, since the parties to a negotiation generally act in constant awareness of budget deadlines. Moreover, the establishment of this type of deadline has produced several undesirable side effects. For one thing the declaration of a statutory (and perhaps artificial) impasse may disrupt prematurely a negotiation and jeopardize an agreement that otherwise might have been effected. In addition, if the statute requires the parties to wait until the specified date before utilizing the impasse machinery, there is often a wasteful marking of time, and the occurrence of many impasses simultaneously seriously overburdening both the impasse machinery and the administering agency. Even though the statute may permit a declaration of impasse prior to the fixed date, there has been a tendency to wait with the same negative results. Finally, budget deadlines are relevant only in regard to disputes involving economic items.

The Minnesota statute adopts a slightly modified version of this same basic approach. In order to utilize the statutory impasse procedure, an "adjustment panel" must be requested by March 1 (Sec. 7). Although there is thus no automatic declaration of impasse, the net effect is the same since an impasse inevitably will be declared by this date in any case in which agreement has not been reached. Another variation of the fixed-date approach is found in the Rhode Island statute. The mediation step of the impasse procedure is available only if requested "within thirty (30) days from and including the

[25] The statutes in Nebraska and certain other states do not have a mediation phase, and the California and South Dakota statutes do not provide any third-party procedure for resolving impasse.

date of [the] first [negotiation] meeting" (Section 28-9.3-9).

An alternative possibility is to permit either party to a negotiation to declare an impasse at any time and to implement the statutory impasse machinery. The basic difficulty with this approach is that because of the relative inexperience and lack of sophistication of both teacher organizations and school boards, particularly in the early years of negotiation, hard bargaining is often confused with impasse and they tend to seek third-party help before exhausting the possibilities of a negotiated settlement. One method of alleviating this problem is found in the Massachusetts provision allowing either party to make its own judgment as to when further discussions are no longer fruitful and to request assistance by the administering agency, but empowering the agency to make an independent evaluation of the situation (Section 178J(a)). If, after investigation, the agency considers the request premature, it can direct the parties to conti e negotiating, or if it concludes otherwise, can provide the requested assistance.

While it is generally agreed that mediation is more effective where both the employer and the employee organization have requested it, the stakes in the public sector are such that the agency is frequently given the authority to send in a mediator at the request of *either* party or occasionally even to send in, on its own initiative, an uninvited mediator where a crisis is developing (*e.g.*, New York Section 209, pars. 2 and 3).

In order not to prejudice a subsequent fact-finding and to preserve the informality and confidentiality of the mediation process, most mediators will refrain from making recommendations for settlement of the issues in dispute. Several recent proposals would assure this restraint through a statutory prohibition. Quite often these proposals would permit the mediator to make such recommendations with the consent of both parties on the ground that the parties sometimes find it politically helpful for an agreed-upon settlement to be announced as the recommendation of an impartial third party.

The question of mediation expense must be discussed in conjunction with the methods available for selecting a mediator. There are essentially two alternatives in the latter regard. One is for the parties to attempt to agree upon a mediator and only if they are unable to do so for the administering agency or some other impartial individual or organization to make the selection. Under his approach, the mediation costs are generally shared by the parties. The second method is for the administering agency to maintain a staff of mediators on a

salaried basis who would provide the mediation service to the parties without cost. This not only contributes to the development of a readily available corps of qualified and experienced experts, but the absence of expense is itself a feature of some substantive significance. Mediation has proven a highly successful procedure for resolving impasse, and there is a general consensus that its use should be encouraged. It can be quite time-consuming, however, and if expense is a factor, this might tend to prevent its proper utilization and result in an excessive use of the fact-finding process.

If mediation is unsuccessful, the initial question is, again, how the fact-finding process should be implemented. One possibility is simply to provide that if mediation fails to resolve the dispute, it moves to the next step of the impasse procedure. The absence of an outside time limit on the period of mediation has been the subject of some criticism since, as the result of inaction, the press of other business and/or undue optimism, the process has, on occasion, been continued so long that there has been inadequate time for fact-finding prior to the budget deadline. In order to avoid this, a time limit for the conclusion of the mediation phase might be established (*e.g.*, 30 days from the date of the mediator's appointment). By the same token, it has been considered undesirable to provide a specified minimum time for mediation because it is often apparent quite early both to the mediator as well as the parties that mediation will be fruitless. In such situations, it would seem desirable to allow the mediator to call for fact-finding without waiting for any necessary period of time to elapse.

Turning to the fact-finding process itself, the statutes almost always deal with the method of selecting personnel to serve as fact-finders. A commonly-used procedure is to provide for a three-member panel, with each party appointing one member and these two appointees then attempting to designate an impartial chairman. If they are unable to agree, either the administering agency, the American Arbitration Association or some other impartial body generally is authorized to make a selection. The alleged advantages of this type of panel—that the decision will be substantively better because it will reflect the thinking of three people and will, for the same reason, have greater impact upon the parties and the public—often have proven more illusory than real. The notion that the decision will be sounder and more well-reasoned is somewhat naive since each party usually designates an obvious partisan

and, in the final analysis, the chairman functions as a single *de facto* decision-maker. Moreover, this structure lends itself to 2-1 decisions, and an unfortunate side effect is the not infrequent issuance of a "minority report" which tends to reduce rather than enhance the persuasive impact of the majority decision upon the parties and the public. (This method of selection should be distinguished from the occasional situation in which a three-man panel of impartials is set up, thereby avoiding many of the above difficulties, and perhaps realizing the alleged advantages (*e.g.*, New York, Section 209, par. 3(b)). There has been a noticeable tendency recently to abandon the panel stucture in favor of a procedure under which the parties attempt to agree upon a single fact-finder and if they are unable to do so, he is appointed by the administering agency or its equivalent.

There is a difference of opinion as to whether the fact-finder should be the same person who functioned as the mediator. Although some advantage may be found in the fact that he will be familiar with the issues and positions of the parties, those who argue in the negative contend that the disadvantages more than outweigh this advantage. The thrust of their argument is that if the mediator is also to be the fact-finder, it will retard the effectiveness of the mediation process. More specifically, the parties will tend to hold back and not reveal their "rock bottom" positions to the mediator since, if they did and the dispute were not settled, the fact-finding would to all intents and purposes be a charade, inevitably destined to produce a recommendation incorporating the previously revealed "rock bottom" position. This is so, the argument runs, because the fact-finder's principal objective is to resolve the dispute as expeditiously as possible. To do this, his recommendations must be accepted voluntarily by both parties and he will already have been told what would be acceptable to one of them. This holding back, they point out, might in some instances prevent a mediated settlement.

One caveat is appropriate here. Several of the proposals would allow the mediator to function also as the fact-finder with the consent of both parties. This exception is justified on the ground that it is often desirable for political reasons to have a mediator assume the role of fact-finder in order to issue a report that incorporates an agreed-upon settlement[26] or because in certain specific situations, the confidence of the

[26] Compare discussion at p. 23, para. 3, *supra*, regarding recommendations for settlement by mediators.

parties in the mediator is such that his continued involvement is desirable.

Experience indicates that once the recommendations of the fact-finder are made public, the positions of the parties tend to become "frozen," and there is increasing support for the view that the recommendations should first be made to the parties privately in broad terms which would provide a framework within which they could negotiate their own settlement of the matters in dispute. Only if the parties have not reached agreement within a specified time thereafter would the fact-finder then be empowered to make public recommendations for settlement of the open issues. Unlike the private recommendations made earlier, these recommendations would prescribe the exact terms which the fact-finder regards as equitable and realistic, and might include a finding as to the relative culpability of the parties for the continuation of the dispute. Most proposals also would allow either party to make the recommendations public at this juncture.

The alternative funding arrangements discussed in connection with mediation exist in the present context as well, but there are certain significant differences regarding the desirability of providing this service without cost to the parties. Since fact-finding is viewed as a last resort process which should, if possible, be avoided, there are those who contend that the statute should impose some type of deterrent to prevent it from being used unnecessarily. This deterrent is often found in the provision that the parties share the mutually incurred costs of the fact-finding procedure.[27] The counterargument is that since fact-finding is endorsed by the state as part of its public policy, it should be provided by the state. More pragmatically, the point is made that the cost factor may deny small teacher organizations access to the procedure. This debate is obviously academic if there is no state agency charged with the administration of the statute, since the parties would of necessity be required to bear the cost.

The cost factor also is relevant in regard to a related problem. In order to relieve the potential burden upon the statutory impasse machinery, some state statutes empower the parties to agree upon their own impasse procedures in lieu of those made available by the statute (*e.g.*, New York, Section 209, par. 2). Whether this option is likely to be exercised or not would seem to depend in large measure upon who bears the cost for the utilization of the statutorily provided machin-

[27] Individually incurred costs are borne by the party incurring them.

ery. It generally is conceded that the availability of statutory mediation and fact-finding without cost to the parties in New York accounts for the overall failure to establish local impasse procedures.

Fact-finding has demonstrated its utility in teacher-school board negotiation. As Governor Rockefeller's Committee on Public Employee Relations observed:

> Fact-finding requires the parties to gather objective information and to present arguments with reference to these data. An unsubstantiated or extreme demand from either party tends to lose its force and status in this forum. The fact-finding report and recommendations provide a basis to inform and to crystallize thoughtful public opinion and news media comment.[28]

But the process by no means provides a wholly satisfactory solution to the problem of negotiation impasse. It is contended that the risks of fact-finding are much greater for the teacher organization than they are for the school board since the organization, as a practical matter, must accept the recommendations of the fact-finder unless it is prepared to violate the ever-present strike prohibition. The school board, on the other hand, may reject the recommendations, comfortable in the knowledge that it can ultimately act unilaterally without effective challenge by the teacher organization. Two alternative methods have been suggested most frequently to correct this claimed inequity.

One method, which is to provide for binding arbitration of negotiation impasse, has been opposed for several reasons. Among the most frequently mentioned are the following. In the first place, binding arbitration is in conflict with the basic notion that the terms and conditions of employment should be determined jointly by the school board and the teachers directly affected. It scarcely warrants extended discussion to demonstrate that, in general, imposed solutions are not likely to be embraced by the parties with the same enthusiasm as solutions mutually arrived at. A second factor militating against binding arbitration is that it is likely to retard the give-and-take inherent in the negotiation process. Why should the parties make a sincere effort to compromise during negotiation when, by doing so, they may prejudice their respective positions if and when they find themselves before

[28] Governor's Committee on Public Employee Relations, Final Report, March 31, 1966, p. 37.

an arbitrator? In addition, the use of arbitration simply shifts the authoritative decision-making power from one level of government to some other public or quasi-public agency which has no responsibility for the quality of service provided by the enterprise involved and no responsibility to the public that is served by that enterprise. Finally, since many school boards do not have the authority to determine the extent of their own budget, the notion of "binding" decisions on items that involve the expenditure of funds is somewhat incongruent.

The second suggested alternative is to legalize the strike, and some of the recommendations that have been made along these lines are discussed in the following section.

G. Strikes and Penalties

It may be stated as a general proposition of law that a strike by public school teachers would, at the present time, probably be illegal in every jurisdiction in the country, either by reason of a state constitutional or statutory provision or upon the basis of common law principles. Even those states that have enacted legislation containing the most liberal provisions for the protection of concerted activity by teachers almost without exception have included in the statute a provision expressly prohibiting strikes.

The foregoing is not meant to suggest that this legal posture is accepted without dissent. A blanket prohibition of the right of all public employees to strike has been protested strongly as a discriminatory and unfair denial of a basic right of citizenship that is in violation of the Federal Constitution. The cases to date, however, have upheld the constitutionality of such a prohibition,[29] and a legislative ban of this type may, for present purposes, be accepted as constitutionally valid.

Assuming that a state chooses to adopt this legal position, it then must deal with several subsidiary questions. Perhaps the most basic is what constitutes a "strike." Although most legislatures have simply outlawed "strikes" and other forms of concerted work stoppages and left the determination of whether a particular case comes within the scope of the prohibition to the courts, the use of certain forms of activity by teacher organizations has led to the suggestion that the statute specify in detail the elements of a strike and indicate the specific activities that might fall within the scope of the definition (*e.g.*, mass resignations, "sanctions," professional holidays, etc.).

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[29] See, *e.g.*, *The City of New York* v. *John J. DeLury*, 160 N.Y.L.J. 102 (N.Y. Ct. App., November 21, 1968).

A second area of concern involves the remedies that are to be imposed if there is a conceded violation of the strike ban. Basically, there are three possible penal deterrents to an illegal strike: the first is the injunctive power of the courts; the second lies in the provisions of state school codes under most of which participation in an illegal strike would constitute misconduct for which teachers could be subjected to reprimand, fine, suspension or dismissal; and the third involves organizational penalties such as denial of recognition or of the privileges accompanying recognition (*e.g.,* dues checkoff). Although these deterrents are probably available in most jurisdictions, the point for present purposes is whether any or all of them should be spelled out in the negotiation statute itself. Although some advocate their enumeration for *in terrorem* purposes, such enumeration almost always is tied to the more significant substantive question of whether their implementation should be mandatory or discretionary. The Maryland statute, for example, expressly provides for the type of organizational penalties that *must* be imposed in the event of a violation of the strike prohibition (Section 175, par. L.). The wisdom of mandatory penalties has been questioned primarily on two grounds: they limit the flexibility which is often necessary to satisfactorily resolve the dispute and reestablish a working relationship between the parties; and they often are unenforceable as a practical matter.

There has been increasing attention paid recently to the possibility of legalizing teacher strikes. Although there are those who advocate a virtually unlimited right to strike, the proposals for legalization that most frequently are advanced would provide for legalization only under certain circumstances. A common feature of many of these proposals is that they would relax the prohibition only for strikes by an organization recognized as the teachers' negotiating representative, and then only in the context of a negotiation impasse. This limitation is premised upon the assumption that the remaining parts of the negotiation statute would provide adequate administrative and/or judicial procedures for resolving problems relating to other aspects of the teacher-school board relationship. Within this framework, various approaches have been suggested.

Under one approach, a strike would be lawful if the school board rejected the recommendations of the fact-finder. Several teacher organizations have opposed this on the ground that, from the point of view of the organization, it provides a

psychologically disadvantageous context within which to conduct a fact-finding. They argue that the fact-finder will be encouraged to issue a report which is likely to be acceptable to the school board because if his report is sufficiently oriented toward the organization's position, so as predictably to result in a school board rejection, the natural and probable consequence is likely to be a lawful strike. Since they see this result as basically at odds with the fact-finder's primary function—*i.e.,* not so much to do basic equity as it is to resolve the dispute without further difficulty—he consciously or unconsciously will tend to give the school board the benefit of the doubt.

A second common suggestion is to legalize the strike where it can be shown that the school board did not make a good faith effort to avoid it or acted in such a manner as actually to provoke it. Others would go further and not quite so far. They concede that if the strike presents a clear and present danger to the public health or safety, it should be enjoined regardless of other factors, including the culpability of the parties. If, on the other hand, the strike does not present such a danger, then subject to the one exception noted below, it would be permitted to continue and the events which preceded and/or provoked it would be irrelevant.[30] Because of the public policy in favor of peaceful resolution of negotiation disputes, they would impose the additional restriction that a strike also could be enjoined if the teacher organization had failed to fully utilize the available statutory impasse machinery.

Although the question of whether a particular strike is enjoinable would be left largely to the court's discretion, most proposals do set forth certain statutorily prescribed procedural guidelines. Typical are the following: First, no injunction should issue except pursuant to findings of fact made by a court on the basis of evidence elicited at a hearing. Second, the evidence must establish that the strike presents a clear and present danger to the public health or safety or that the teacher organization had failed to fully utilize the available statutory impasse machinery. In either case, the injunction would be no broader than necessary. In the former situation, it would prohibit only those activities that constitute the demonstrated threat to the community's health or safety. In the latter case, it would specify the delinquencies of the teacher

[30] The question of culpability might, however, be relevant for other purposes. Thus, it has been suggested that if school board members are guilty of unfair practices which precipitate a strike, they should be liable to various personal penalties (*e.g.,* a denial of the right to hold public office for a specified period of time; fines).

organization and would remain operative only until those delinquencies had been corrected.

Proposals of the foregoing type are apparently premised upon the belief that the proposed framework will encourage the parties to avoid impasse and, thus, reduce the incidence of strikes. The element of doubt as to whether and/or when an injunction would ultimately issue if the teachers struck after fact-finding would presumably make the fact-finding as risky for the school board as for the teacher organization, and they should both be motivated to resolve their problems through negotiation. Moreover, if fact-finding were to occur, both parties should be under severe pressure to accept the recommendations.

A point of clarification is necessary here. While the above discussion is phrased in terms of a limitation upon the injunctive power of the courts most of these proposals would legalize the strike for all purposes under the indicated circumstances, thereby eliminating other penalties as well.

Until quite recently, proposals for the statutory legalization of teacher strikes under any circumstances seemed almost frivolous, but recent legislative activity indicates that this possibility now must be viewed in a somewhat different light. While it is noteworthy that an increasing number of teacher organizations are introducing statutes which would legalize teacher strikes in specified situations, of greater significance is the fact that this position has also found some favor in more objective quarters.

A special commission appointed by Governor Raymond P. Shafer of Pennsylvania in 1968 to recommend appropriate legislation for public employee negotiation in that state proposed that certain categories of public employees, including teachers, be granted the right to strike in situations where the public health, safety or welfare was not endangered. A statute has also been proposed by a special legislative commission in Colorado which would likewise legalize public employee strikes under certain circumstances. Both proposals are now pending before the respective state legislatures.

conclusion

The foregoing discussion provides little more than the bare bones of a statutory scheme. In order to draft an adequate negotiation statute, it would be necessary not only to flesh out those matters discussed, but to deal, in addition, with numerous other matters which, because of space limitations, have not even been touched upon.[31] Although we feel that in many instances the balance clearly supports one approach rather than another, it is not our intention to suggest that a *sine qua non* of statutory effectiveness is that these matters be handled in a particular way or, indeed, even that they all expressly be dealt with in the statute. What we do maintain, however, is that they are all of significance and that the legislative position regarding them should be determined by affirmative decision after proper consideration of the relative pros and cons and not by default.

In the final analysis, there is really only one criterion for judging the effectiveness of any negotiation statute—that is, does it work? The most logically conceived and astutely dratted statute is a failure if it does not result in establishing and maintaining a viable and mutually acceptable working relationship between teachers and school boards which is consistent with the effective operation of the educational enterprise. If it succeeds in accomplishing that result, all else is irrelevant.

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31 Among other things: Should the statute deal with the question of disputes arising under a collective agreement? If so, are there any constitutional, statutory or policy objections to binding arbitration for the resolution of such disputes? Are special provisions required to safeguard the integrity of tenure laws or to provide for their modification?; etc.

Not directly related to the negotiation statute itself, but of critical importance in teacher-school board relations is the previously noted fact that school boards frequently lack the authority to make an effective decision involving the appropriation of public funds. It follows that the relative merits and demerits of fiscally independent school boards should be considered in connection with any attempt to develop a system of negotiation in public education.

APPENDIX A
CITATIONS FOR STATE NEGOTIATION STATUTES CITED IN DOCUMENT

State	Citation
California	Cal. Gov. Code, §3501 (West 1966); Cal. Educ. Code, §§12901-13088 (West 1969).
Connecticut	Conn. Gen. Stat. Ann. §10-153(a) (Supp. 1965).
Maryland	Md. Ann. Code, art. 77, §175 (1965).
Massachusetts	Mass. Gen. Laws Ann. ch. 149, §178 GN (1965).
Michigan	Mich. P.A. 1965 379, M.S.A. §17.455(I) *et seq.*
Minnesota	Minn. Stat. Ann. §§125.19-.26
Nebraska	Neb. Rev. Stat. §48-48-22 (Supp. 1965).
New Jersey	N.J.S.A. §§34:13 A-1 *et seq.*
New York	N.Y. Civil Serv. Law §§200-212 (McKinney's Supp. 1968).
North Dakota	House Bill No. 175 (1969).
Oregon	Ore. Rev. Stat. ch. 342, §§342.450-.470 (1965).
Rhode Island	R.I. Gen. Laws, tit. 28, §§28-9.3-1 to 9.3-15 (1966).
South Dakota	Senate Bill No. 150 (1969).
Washington	Wash. Rev. Code Ann., §§28.72.010-.090 (1964).
Wisconsin	Wisc. Stat. §111.70, (*as amended* Supp. 1967).